his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called a 'notice of assessment' .... But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act or operation of the commissioner.

Encik Shaharuddin pointed out that Buttrose J in *ABC* v *The Comptroller of Income Tax, Singapore*[3] had stated that the assessment itself is the administrative act of the Comptroller and determines the quantum of tax, whereas the notice of assessment imposes the liability to pay and sets the time running for objecting to the quantum of the assessment. A notice of assessment does not affect the amount payable. Senior federal counsel then conceded that the learned judge was in error in stating that the Revenue's claim was based on negligence. He stated that this was simply a claim by the government for payment of income tax and that it was clear from the decided cases referred to by Gill FJ (as he then was) in *Sun Man Tobacco Company Ltd* v *Government of Malaysia*[4] that the effect of the relevant provisions of the Income Tax Act 1967 was that on the service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment, and could be recovered by the government by civil proceedings as a debt due to the government. On such civil proceedings being brought by the government, the court, unlike the Special Commissioners of Income Tax, has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

Senior federal counsel also referred us to the High Court case of *Government of Malaysia* v *Abdul Rahman*.[5] In that case the taxpayer had been assessed to pay income tax and an additional income tax for certain years. On his failure to pay the amount claimed, the Government of Malaysia instituted a suit against him and applied for leave to enter final judgment. The assistant registrar gave leave to the Revenue and the taxpayer appealed. The appeal was dismissed on the grounds that the court could not entertain any plea that the tax or additional tax was not correctly assessed and therefore leave to sign final judgment was confirmed. We would agree and approve the following dictum of Arulanandom J (as he then was) in that case when he said:

> When proceedings are commenced under O 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when the defence raises triable issues it is a rule of law that unconditional leave to defend should be given but under s 106(3) of the Income Tax Act it clearly states that in any poceedings commenced by the government under s 106(1) of the Act for the recovery of tax by civil poceedings as a debt due to the government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5). In this case the Director-General had exercised his powers under s 91(1) of the Act and made additional assessments and added penalties which were provided for by the Act. Since the amount was not paid within 30 days further penalties were added and since that was not paid civil proceedings were brought to recover the tax as a debt due to the government. Under s 103(1) regarding payment of tax, the section reads:
>
> '103(1) Subject to this section, tax payable under an assessment for a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.'
>
> It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that the moment the notice of assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not.

We were satisfied that in this case there are no triable issues and therefore dismissed the taxpayer's appeal with costs. However, as it was not due to any fault on the part of the taxpayer that his appeal to the Special Commissioners has still not been heard since 1985, in the exercise of our inherent jurisdiction we ordered a stay of execution until determination by the Special Commissioners of the taxpayer's appeal against the assessments raised against him. We also ordered that the deposit of $500 be paid to the Revenue to account of taxed costs.

Order accordingly.

Solicitors: *Koh Kim Leng & Co.*

Reported by *Prof Ahmad Ibrahim*

Development & Commercial Bank Bhd v Num Tjuan Sdn Bhd

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 408 OF 1988
LEE HUN HOE CJ (BORNEO), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
4, 5 AND 9 JANUARY 1989

Civil Procedure – Judgment in default of appearance – Execution – Ownership of attached properties – Claimant showing that he is lawful owner of properties – Appeal – Question of fact – When appeal court can interfere with findings of fact

In this case the appellant/plaintiff had obtained judgment in default against Lam Chuan Company (defendant). In execution of the judgment certain properties had been attached on 27 January 1988 at certain premises in Ipoh. At the time of the attachment the premises were occupied by the respondent-claimant but at the time of the judgment it was occupied by the defendant. The defendant had been wound up on 16 April 1987 and did not operate on the premises. The respondent bought chattels and cloth materials from the defendant and also purchased more cloth materials from other suppliers. The respondent

claimed to be the owner of the goods attached. The senior assistant registrar dismissed the claim as he took the view that there was no bona fide purchase. On appeal (see [1989] 1 MLJ 318), the learned judge of the High Court disagreed with the senior assistant registrar and relied on the evidence of the witnesses who testified that they had supplied the goods to the respondent. The appellant appealed.

Held, dismissing the appeal:

(1) The learned judge was justified in disagreeing with the senior assistant registrar in this case and had given his reasons for so disagreeing.

(2) The learned judge was correct in holding that the respondent had been able to establish that they were the lawful owners of the attached properties.

Case referred to

1 *Sigma Air Conditioning Sdn Bhd* v *World Wide Agencies (M) Sdn Bhd* [1980] 1 MLJ 179 (refd)

Lim Seong Chun for the appellant.
SA Lingam for the respondent.

Appeal from: Civil Suit No 23-536-86, Application for Execution No 49-205-87 (High Court, Ipoh)

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): We dismissed the appeal and stated we would give our reasons later. We do so now.

This appeal concerns the question of ownership of certain attached properties.

The plaintiff (Development & Commercial Bank Bhd) obtained a judgment in default of appearance against the defendant (Lam Chuan Company) on 14 January 1987 for $429,202.76 with interest and costs. In execution of the judgment certain properties had been attached at No 76, Jalan Sultan Iskandar, Ipoh on 27 January 1988 which at the time of attachment was occupied by the claimant (Num Tjuan Sdn Bhd). But at the time of judgment it was occupied by the defendant.

There was an earlier attachment on 21 August 1987 but this was abandoned after negotiation. So that the present attachment is the second one.

The defendant had wound up on 16 April 1987 and did not operate on the premises since.

By a sale agreement dated 13 April 1987 the claimant bought from the defendant chattels ($3,000) and cloth materials ($47,000). The claimant was incorporated the following day, ie 14 April 1987, with $50,000 issued and paid-up capital and $300,000 authorized issued capital. The claimant also purchased from 28 suppliers more cloth materials totalling $459,735.49.

From 1 May 1987 the claimant became the tenant of the premises at $1,900 per month as evidenced by the tenancy agreement. The claimant claimed to be the owner of the property attached. The matter came before the senior assistant registrar ('SAR') who dismissed the claim on 14 May 1988. The SAR heard not less than 15 witnesses. At least 12 suppliers testified that the claimant bought the goods from them. The SAR rejected these taking the view that there was no bona fide purchase and relying on *Sigma Air Conditioning Sdn Bhd* v *World Wide Agencies (M) Sdn Bhd*.[1] There the plaintiffs had obtained judgment against the defendant company and had proceeded to attach the movable property of the defendant company. The objector claimed to be the owner of the goods seized. The senior assistant registrar dismissed the notice of objection. In dismissing the appeal the learned judge held that the senior assistant registrar was right and that the evidence showed that the goods were purchased by the objector for and on behalf of another company. It was for that company to object and not for the objector to do so. It was further held that even if the objector had purchased the goods for himself, he had failed to show that the purchase was bona fide. The sale agreement was colourable.

In the case under appeal the learned judge disagreed with the SAR who took the view that there were two issues, namely:

(1) whether the claimant had purchased the goods as listed in the inventory from the judgment debtor at the time of the first intended attachment; and
(2) whether the purchase was done bona fide, if the answer to the first issue was positive.

The learned judge considered that there was really only one issue, ie whether the goods belonged to the claimant or the defendant at the time of attachment. He noted that 12 witnesses testified that they had supplied the said goods to the claimant. There were 28 suppliers and they came from different parts of the country as well as from Singapore. There was no evidence to show that they conspired with the claimant to cheat the plaintiff. He distinguished *Sigma's* case[1] by pointing out that the facts in our case were different.

Before us the plaintiff tried to show that the purchase of goods by the claimant from the defendant was not genuine and that many suppliers were never paid. The claimant conceded that eight suppliers had yet to be paid. The plaintiff alleged that particulars relating to the purchases were fabricated. There was no payment in fact. Those who formed the claimant company (except for Lee Wan, the managing director, of the claimant company) were related to the defendant. He contended that the disposal of the goods to the claimant was purely to defraud the execution creditor.

The learned judge had gone into the matter very carefully. He realized that the SAR had heard many witnesses and had the advantage of observing and hearing the witnesses. Normally, an appellate court would

not disturb the findings of the lower court. It is of course the duty of an appellate court to be a judge of fact as well as of law. At the same time it would be abrogating its function if it made a hard and fast rule never to interfere with the findings of fact and felt bound to support a judgment which, on review of all the evidence, it considered to be clearly wrong. The learned judge had given his reasons for disagreeing with the SAR.

We find that we agree with the view of the learned judge that the claimant had been able to establish that they were the lawful owners of the attached properties. Accordingly, we support the learned judge in dismissing the appeal.

Appeal dismissed.

Solicitors: *Lim Seong Chun & Co*; *SA Lingam & Co.*

Reported by *Prof Ahmad Ibrahim*

Ting Chong Maa v Chor Sek Choon

HIGH COURT (IPOH) – CIVIL SUIT NO 22-223-1987
PEH SWEE CHIN J
31 JANUARY 1989

Companies and Corporations – Locus standi of shareholder to sue director of company – Shareholder and director own equal shares in company – No majority or minority shareholder – Determination of who controls the company – Includes de facto control – Exceptions to rule in Foss v Harbottle – Whether shareholder has locus standi

In this case, the plaintiff (the shareholder of a company) and the defendant (the director) both own the equity of the company equally. The plaintiff had alleged that the defendant had obtained secret profits by diverting the company's customers to another firm and the plaintiff therefore claims accounts and inquiries and payment of sums found due thereon. The defendant applied for the statement of claim to be struck out on the ground that the plaintiff had no locus standi to file the present action. The main issue for the court to decide was therefore whether a shareholder of a company had locus standi to sue, for the company, a supposedly erring director of the company.

Held, dismissing the defendant's application:

(1) The leading case of *Foss* v *Harbottle*[1] testifies to majority rule in companies by holding to the effect that an individual shareholder of a company cannot sue, for a wrong done to the company, in his individual name on the grounds that the company is the true and proper plaintiff and that, in any event, the alleged wrong could be, if need be, ratified by a simple majority of members.

(2) The rule in *Foss* v *Harbottle*[1] has, however, three exceptions. The three exceptions are acts which in effect cannot be ratified by the majority shareholder at a general meeting. They are: (a) any act which is ultra vires the company; (b) any act which is a fraud on the minority and the alleged wrongdoers control the company; and (c) an act which can only be effective if resolved by a special resolution and which is resolved by a simple majority.

(3) In the present case, both the plaintiff and the defendant own the issued capital in equal shares. There is no clear majority so that the plaintiff cannot be in truth a minority shareholder nor the defendant a majority shareholder. However, being a majority or minority shareholder is not a conclusive test, for what the second exception to the rule in *Foss* v *Harbottle*[1] requires is that the alleged wrongdoer be in control. In the instant case, the defendant has been the managing director; other things being equal, he would prima facie have de facto control of the company. Control here should include de facto control though the defendant has less than a clear majority of shares.

(4) The averments in the statement of claim prima facie suggest a fraud on the minority. For the reasons stated above, the plaintiff has the locus standi to maintain this action.

[*Obiter*: The learned judge made the following comments after ruling on the main issue in the case: (a) when there are more than two shareholders, the plaintiff in suing for a wrong done to his company and bringing himself within an exception to the rule in *Foss* v *Harbottle*[1] ought to sue in a representative capacity on behalf of himself and all other shareholders or members other than the real defendant or defendants under O 15 r 12 of the Rules of the High Court 1980; (b) it is at least desirable, if not essential, that a company in an action similar to the present be made a co-defendant, since it cannot be a plaintiff as both of its two vital organs, viz board of directors and general meeting, would not authorize such court action.]

Cases referred to

1 *Foss* v *Harbottle* [1843] 2 Hare 461; 67 ER 189 (refd)
2 *Edwards* v *Halliwell* [1950] 2 All ER 1064 (refd)

Legislation referred to

Companies Act 1965 s 181(i)(a)
Rules of the High Court 1980 O 15 r 12

Loh Yew Dong for the plaintiff.
Lau Cheong for the defendant.

Cur Adv Vult

Peh Swee Chin J: Once again, a point of fairly frequent controversy has cropped up before me. I told counsel I would deliver a short written judgment and here I do.

The point in question is that of a shareholder of a company suing, for the company, a supposedly erring director of the company but is faced with an immediate objection from the director that such action is not competent, or as is stated in the present case, that plaintiff has no locus standi.

The shareholder, ie the plaintiff, and the director, ie the defendant, both own equally the equity of the company. The plaintiff, in a nutshell, alleges that the defendant has obtained secret profits by diverting the company's customers to another firm. The plaintiff claims therefore accounts and inquiries and payment of sums found due thereon.